87-147

Supreme Court, U.S.
FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CARLOS MADRID-PALACIOS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4716

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway
New York, NY 10007
(212) 513-7676

Attorneys for Petitioner
Carlos Madrid-Palacios

Of Counsel

Victoria B. Eiger
Ellen J. Schneider

QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioner, who raised several substantial legal issues on appeal, was denied his right to meaningful appellate review by virtue of the Circuit Court's refusal to hear oral argument and subsequent affirmance without opinion.

II. Whether the trial court's jury charge, which failed to identify the elements of the crime of conspiracy and failed to state that each must be proved beyond a reasonable doubt, violated basic constitutional rights.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....vi

JURISDICTION OF THE COURT.....vi

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....vii

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING THE WRIT

1. PETITIONER, WHO RAISED SEVERAL SUBSTANTIAL LEGAL ISSUES ON APPEAL, WAS DENIED HIS RIGHT TO MEANINGFUL APPELLATE REVIEW BY VIRTUE OF THE CIRCUIT COURT'S REFUSAL TO HEAR ORAL ARGUMENT AND SUBSEQUENT AFFIRMANCE WITHOUT OPINION.....11

2. THE TRIAL COURT'S JURY CHARGE, WHICH FAILED TO IDENTIFY THE ELEMENTS OF THE CRIME OF CONSPIRACY AND FAILED TO STATE THAT EACH MUST BE PROVED BEYOND A REASONABLE DOUBT, VIOLATED BASIC CONSTITUTIONAL RIGHTS.....26

CONCLUSION.....34

APPENDIX

ORDER OF THE ELEVENTH CIRCUIT
AFFIRMING JUDGMENT OF
CONVICTION
(APRIL 23, 1987).....A-1

ORDER DENYING PETITION FOR
REHEARING AND SUGGESTION FOR
REHEARING EN BANC
(MAY 29, 1987).....A-3

TABLE OF AUTHORITIES

CASES

Barefoot v. Estell, 463 U.S. 880 (1983).....2,11

County of Los Angeles v. Kling, 106 S.Ct. 300 (1985).....19

Francis v. Franklin, 105 S.Ct. 1965 (1985).....26

In re Winship, 397 U.S. 358 (1970).....26

Lott v. United States, 218 F.2d 675 (5th Cir. 1955), cert. denied, 351 U.S. 953 (1956).....26

Rose v. Clark, 106 S.Ct. 3101 (1986)....33

Ross v. Moffitt, 417 U.S. 618 (1974)....2,11

United States v. Bosch, 505 F.2d 78 (5th Cir. 1974).....26

United States v. Chagra, 669 F.2d 241, (5th Cir.), cert. denied, 459 U.S. 846 (1982).....23

United States v. Jackskion, 102 F.2d 683 (2d Cir.), cert. denied, 307 U.S. 635 (1939).....23

OTHER AUTHORITIES

N. Cripe, "Effective Appellate Argument," 70 ABA Journal 56 (Dec. 1984).....18

J. Davis, "The Argument of An Appeal," 26 ABA Journal 895 (Dec. 1940).....18

T. Newman, N.Y. Appellate Practice §8.03 (1986).....18

United States Eleventh Circuit District Judges Association, Pattern Jury Instructions, Criminal Cases, 213-14 (1985 ed.).....27

OPINIONS BELOW

Neither the United States District Court nor the United States Court of Appeals for the Eleventh Circuit issued an opinion in this case.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals was entered on April 23, 1987. (A-1) That Court denied a petition for rehearing and rehearing en banc by order dated May 29, 1987. (A-3)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, United States Code, §1291:

> The courts of appeals (other than the United State Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rule 34(a) of the Federal Rules of Appellate Procedure:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:
>
> Oral Argument will be allowed unless
>
> (1) the appeal is frivolous; or
>
> (2) the dispositive issue or set of issues has been recently and authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE CASE

Introduction

Following his conviction after a jury trial and sentence of 25 years imprisonment, petitioner Carlos Madrid-Palacios sought review by the Eleventh Circuit Court of Appeals. But the appeal he expected and was entitled to never materialized.

Although petitioner raised several clearly substantial legal issues, the government, mischaracterizing his claims, never addressed them and misrepresented critical portions of the record. In light of the confusion created by the briefs, this was precisely the type of case where oral argument was essential. The Eleventh Circuit, however, denied petitioner's request for oral argument without providing him an opportunity to contest the ruling, and simultaneously affirmed his conviction without opinion. The

court thus left petitioner in the dark as to the basis of its ruling and whether the it even understood or ruled on the true nature of his claims.

A criminal defendant's direct initial appeal is the critical stage in post-judgment proceedings. See Ross v. Moffitt, 417 U.S. 618, 614-16 (1974); Barefoot v. Estelle, 463 U.S. 880 (1983). Both the Federal Rules of Appellate Procedure and the Eleventh Circuit's local rules provide that oral argument may be denied and an opinion dispensed with only in certain discrete circumstances, none of which exist here. Accordingly, the circuit court's summary manner of handling this appeal, which appears to represent a growing trend, cannot be countenanced. As happened here, such a policy encourages the government to mischaracterize legal issues and to distort the record without having to be accountable in

person during the interplay of oral argument or to endure the rigors of legal and factual analysis required by a written opinion. While petitioner recognizes that the dockets of the appellate courts are undoubtedly heavy, such interests cannot justify paying little or no attention to a substantial appeal of a criminal defendant facing 25 years of imprisonment.

Chronology

On December 19, 1984, petitioner Madrid and several others were charged with conspiracy to possess cocaine with intent to distribute and the substantive crime of possession of cocaine with intent to distribute. It was the government's contention that the defendants comprised a cocaine distribution chain and that they engaged in a conspiracy to sell, and did sell,

cocaine to three individuals who were, in fact, undercover Drug Enforcement Adminstration agents.

The prosecutor claimed that Madrid was the source of the cocaine. None of the undercover agents who negotiated with the co-defendants for the purchase of cocaine had any contact with Madrid. Rather, the case against him rested on surveillance evidence which, if believed, showed that after the negotiations were completed, co-defendants delivered a van to a person identified as Madrid who drove the van and, it could be inferred, retrieved the cocaine and then turned it over to co-defendants for delivery. Madrid disputed that it was he who drove the van.

In addition, the government introduced certain evidence seized from Madrid's apartment and his safety deposit box. These materials, introduced over vigorous defense

objection, included various documents which, according to the government, outlined personnel and procedures for the illicit distribution of unidentified contraband, presumably narcotics; $120,000 in cash; and a Colombian and a Venezualan passport and an application for a Mexican passport. None of this evidence pertained to the limited narcotics transaction at issue in this case, and, in light of Madrid's history as a political activist in Venezuela, may have had nothing at all to do with narcotics.

In charging the jury, the court properly specified the elements of the substantive crime of possesion of cocaine with intent to distribute which was the purported object of the conspiracy and instructed that each element must be proved beyond a reasonable doubt. In contrast, on the conspiracy count, the court discussed conspiracy in general and

pointed out what the evidence need not show. At no point, however, did the trial judge identify, as elements, the elements of the crime of conspiracy or indicate that, to convict, the jury was required to find, by proof beyond a reasonable doubt (1) that there was a conspiracy as he had defined that term, and (2) that the defendant knowingly and willfully became a member of the conspiracy.

In petitioner's request to charge, he had proposed instructions which explicitly (and correctly) stated the elements of the crime of conspiracy and that each must be proved beyond a reasonable doubt. At the charge conference, the trial judge rejected Madrid's request, stating that it "is a little bit different from the one I normally give, not substantially. You can argue everything that is in your request to charge, and this one

[the court's] has been affirmed maybe 200 times and I just hate to tinker with success on that."

The jury returned a guilty verdict against Madrid and others. Madrid was sentenced to a 25 year prison term and a total fine of $500,000.

On appeal to the Eleventh Circuit, petitioner raised several legal issues. Among them, he claimed that the jury instruction was fatally defective because it omitted the crucial definition of the elements of conspiracy and failed to apprise the jury that each element had to be proved beyond a reasonable doubt. He also argued that admission of the "instruction manual," passports and $120,000 cash was in error because this evidence was highly prejudicial, did not pertain to the transaction at issue and was used as evidence of bad character.

In its reply, the government failed to join issue, misstated petitioner's contentions and mispresented the record. Specifically, on the charge point, the government answered by stating that the reasonable doubt charge was adequate and then stated in a conclusory fashion, without any basis, that the court had properly identified the elements of the crime. (Government Brief at 39). In addition, the government claimed that the so-called "instruction manual" was not admitted into evidence, although it elsewhere acknowledged that relevant portions were put before the jury. (Government Brief at 15-16, 21).[1] The government did not address the question of its admissibility. In petitioner's reply brief, he repeatedly alerted the court to the failure

---

[1]The Supreme Court rules do not allow petitioner to submit the briefs filed below. See U.S. Sup. Ct. Rule 21.3. However, we believe they are pertinent here and will make them available upon request from the Court.

of the government to respond to his legal claims and the confusion concerning the record which the government's brief had engendered.

Pursuant to Local Rule 22(f)(4) of the Eleventh Circuit Rules, petitioner included a "short statement" in his brief duly requesting oral argument. Without any notice having been given to him, the case was placed on the non-argument calendar.[2] On April 13, 1987, a panel of the court issued a per curiam order, without opinion, affirming the judgment.

Petitioner moved for rehearing and made a suggestion for rehearing en banc on the ground, among other things, that where substantial legal issues were raised which were mischaracterized and not answered by the government, it was improper for the court to

---

[2]Despite repeated inquiries, petitioner's counsel learned for the first time that no argument would be heard when he was informed that the appeal had already been decided and the conviction affirmed.

deny oral argument and affirm without opinion. On May 29, 1987, petitioner's application was denied.

REASONS FOR GRANTING THE WRIT

1. PETITIONER, WHO RAISED SEVERAL SUBSTANTIAL LEGAL ISSUES ON APPEAL, WAS DENIED HIS RIGHT TO MEANINGFUL APPELLATE REVIEW BY VIRTUE OF THE CIRCUIT COURT'S REFUSAL TO HEAR ORAL ARGUMENT AND SUBSEQUENT AFFIRMANCE WITHOUT OPINION

Congress has provided that every criminal defendant can have an appeal as of right to the Circuit Court of Appeals. 28 U.S.C. §1291. It is well recognized that the initial direct appeal is the critical stage for review of the trial proceedings. See Ross v. Moffitt, 417 U.S. 618, 614-16 (1974); Barefoot v. Estelle, 462 U.S. 880 (1983).

In this case, where petitioner was convicted after a jury trial which raised several substantial appellate issues, he was denied the meaningful exercise of this right. On the appeal, the government mischaracterized certain of petitioner's points and thus did

not answer them. The government's brief also created confusion concerning critical aspects of the record. Because the Eleventh Circuit, contrary to the dictates of the Federal Rules of Appellate Procedure and its own local rules, refused to hear oral argument and affirmed in a one-word per curiam opinion, there can be no assurance that the court focused on, resolved or even considered petitioner's substantial legal claims.

Rule 34(a) of the Federal Rules of Appellate Procedure provides three bases upon which oral argument can be denied:

> i) the appeal is frivolous;
>
> ii) the issue has been recently and authoritatively decided; or
>
> iii) the facts and legal issues are adequately presented in the brief.

In addition, the rule provides that where a court does deny argument, a party must be given an opportunity to file a statement

setting forth the reasons why he believes oral argument is necessary. Local Rule 23 of the Eleventh Circuit Rules permits a three-judge panel to refuse oral argument on the bases provided in Rule 34.

Here, neither the standards nor procedure established by F.R.A.P. 34 have been met. As to the criteria for denial, the appeal -- which raised several substantial contentions that the government chose to avoid rather than answer -- was by no means a frivolous one. And the government's brief, itself 47 pages long, cited no cases recently or authoritatively determining the dispositive issues. Moreover, because the parties differed so dramatically in their views of the facts and issues, this case was somewhat unusual in that, despite petitioner's best efforts to fairly and accurately brief the case, the briefing process did not succeed in

clearly focusing the issues. The government's brief misstated and distorted both the facts of the case and issues raised by petitioner. As a consequence, the actual issues presented were muddied and confused, and the confusion was apparently not eliminated by petitioner's reply brief. Oral argument was crucial so that the areas of conflict and disagreement, which had been created by the briefs rather than clarified by them, could be explored and clarified by the court.

Specifically, the record was confused as to whether at least one specific document of the various papers the government had moved into evidence at trial -- a multi-page typewritten document in Spanish which the government claimed constituted a how-to manual for operation of a narcotics ring -- was ultimately admitted or ultimately excluded. The problem arose in part because similar

multi-page documents were found in different locations and in different forms, and the reporter's transcript was unclear as to which particular documents were being dealt with. The existence of translations of the documents compounded the confusion.

Appellate counsel's examination of the original exhibits led to the conclusion that, except for one page, the manual was admitted into evidence. The government took the position that the manual was ultimately excluded. At the same time, however, the government conceded in its brief that "a portion of" a manual for the operation of a large-scale cocaine distribution ring as well as notes outlining procedures to be used for the illicit distribution of contraband were in fact admitted. (Government Brief at 15-16). It is also undisputed that the government argued to the jury that these documents

comprised substantial proof of petitioner's participation in the conspiracy and his role as the cocaine source, thus providing further confirmation that the documents were admitted. In the argument section of its brief, however, rather than urging that the documents which the government conceded were admitted, were properly admitted, the government ignored the issue entirely.

Plainly, oral argument was essential to clarify the record in terms of what exhibits the jury actually had before it and to permit the Court to inquire as to the government's position on the legal issue. Without oral argument, and without any written opinion, it is simply impossible to know if the court affirmed because it erroneously concluded that the manual was not in evidence or because it found it to be admissible even though it had no relevance to the case.

Similarly, petitioner urged that the trial court's charge had failed to identify the elements of conspiracy as elements of the crime, each of which had to be proved beyond a reasonable doubt. (See Point 2, infra.) The government refused to confront this issue and argued only that the reasonable doubt portion of the charge was adequate. Plainly, oral argument here was essential to focus the issue for the court and to permit the court to elicit the government's legal position which the government had avoided in its brief.

In denying argument, the Circuit Court also failed to abide by the procedure of F.R.A.P. 34. Rule 34 provides that where argument is denied, an appellant (or other party) be given "an opportunity" to state his reasons why argument is necessary. Although petitioner had filed the necessary "short statement" requesting oral argument in his

brief (see Local Rule 22(f)(4) of the Eleventh Circuit Rules), he was given no opportunity to fully state the basis for his request after his case had been placed on the non-argument calendar. Indeed, he was not notified that oral argument would not be permitted until he was informed that in fact his case had already been decided. There was thus no opportunity, as required by Rule 34(a), to make an appropriate showing.

The importance of oral argument is well known and cannot be overstated. Justice Brennan has been quoted as saying that:

> Oral argument is the absolutely indispensable ingredient of appellate advocacy...often my idea of how a case shapes up is changed by oral argument.

See N. Cripe, "Effective Appellate Argument," 70 ABA Journal 56 (Dec. 1984); see also J. Davis, "The Argument of An Appeal," 26 ABA Journal 895 (Dec. 1940); T. Newman, N.Y.

Appellate Practice §8.03 (1986) (oral argument important because "[i]t is astonishing how often points which [counsel] think are clearly and logically stated and developed in [their] brief do not appear as clear and logical to the judges. Without oral argument, the lack of clarity will remain, often with deleterious effects"). Given the confusion as to the record and the issues actually before the court, the opportunity for oral argument was especially critical here.

The decision of the Eleventh Circuit to resolve this case without rendering an opinion was also improper. In County of Los Angeles v. Kling, 106 S.Ct. 300, 301 (1985), Justice Stevens stated in his dissent that the "decision [by a Circuit Court of Appeals] not to publish the opinion or permit it to be cited -- like the decision to promulgate a rule spawning a body of secret law -- was

plainly wrong." This principle of open legal decisions which are precedential and thus subject to legal scrutiny applies with equal, if not greater, force to cases where no opinion is rendered since all parties are kept in the dark as to the basis of the court's decision.

Implicitly recognizing the importance of issuing opinions in cases raising substantial legal issues, Local Rule 25 of the Rules of Eleventh Circuit sets forth the specific circumstances where it may be appropriate for the court to affirm a judgment without opinion.[3] Even under the court's own rule,

---

[3]Rule 25 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of
>
> (footnote continued)

however, this was not a proper case for failing to issue an opinion. None of the triggering circumstances listed in subsections (a) through (d) of the Rule were met. And even if they were, the Rule provides that affirmance without opinion is permitted only if the Court also determines that no error of law appears and that an opinion would have no precedential value.

(footnote continued from previous page)

a jury verdict is not insufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

No such determination could properly have been made here. If there were no errors of law, it was because the Eleventh Circuit made and applied new law in this case, and, under those circumstances, an opinion would obviously have great precedential value.

By way of example, petitioner urged on appeal that it was error to admit into evidence $120,000 in cash found in Madrid's apartment. As Madrid's brief argued, whatever the money was, it was not evidence of the charged conspiracy or the charged possession, and it could not possibly be the proceeds of the crimes charged. Petitioner cited, and distinguished, the line of cases in which cash in an unusual amount has been found admissible.

In response, the government relied on United States v. Jackskion, 102 F.2d 683, 684 (2d Cir.), cert. denied, 307 U.S. 635 (1939) quoting,

> [w]here a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible even though the source of the money is not traced.

It also relied on United States v. Chagra, 669 F.2d 241, 255-56 (5th Cir.), cert. denied, 459 U.S. 846 (1982), where, according to the government, the Court upheld the admission of evidence of defendant's lavish expenditures notwithstanding that those proceeds could not be connected to the accused's alleged narcotics trafficking.

Jackskion, as the quoted material plainly shows, is inapplicable. And so is Chagra, a continuing criminal enterprise prosecution in which the government was obligated to prove

that the defendant engaged in a series of felony violations and obtained substantial income or resources from that conduct. Thus, in affirming here, the Eleventh Circuit apparently went beyond existing precedent and developed a new, but unstated, standard concerning the admissibility of cash unconnected to the crime charged.

The failure of the Circuit Court to abide by its own rules and the Federal Rules of Appellate Procedure cannot be tolerated in a system where the orderly and uniform administration of the laws is the bedrock of our judicial system. On the basis of this record, there is no assurance that the Court of Appeals considered or resolved the precise legal points raised by petitioner, and there is the further possibility that the case was decided on the basis of a secret body of unpublished and unspoken law which apparently

applies only to certain litigants. This petitioner has not had the appeal to which he is entitled, and the writ of certiorari should be granted.

2. THE TRIAL COURT'S JURY CHARGE, WHICH FAILED TO IDENTIFY THE ELEMENTS OF THE CRIME OF CONSPIRACY AND FAILED TO STATE THAT EACH MUST BE PROVED BEYOND A REASONABLE DOUBT, VIOLATED BASIC CONSTITUTIONAL RIGHTS

As the Supreme Court has made clear, "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); Francis v. Franklin, 105 S.Ct. 1965, 1971 (1985). It is thus imperative that a trial court clearly identify for the jury the elements of the crime and instruct that each be proved beyond a reasonable doubt. See United States v. Bosch, 505 F.2d 78, 82 (5th Cir. 1974); Lott v. United States, 218 F.2d 675, 681 n. 71 (5th Cir. 1955), cert. denied, 351 U.S. 953 (1956). Because this was not

accomplished in this case, the decision of the Court of Appeals affirming petitioner's conviction cannot be squared with recognized constitutional precepts.

In its request to charge, the defense had requested that the court specify the elements of the crime of conspiracy. The Eleventh Circuit Pattern Jury Instructions also provided that, in order to convict, the evidence in the case must show beyond a reasonable doubt:

> First, that two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and
>
> Second, that the defendant knowingly and willfully became a member of such conspiracy.

See United States Eleventh Circuit District Judges Association, Pattern Jury Instructions, Criminal Cases, 213-14 (1985 ed.).

Here, no such instruction was given in these words or in any other.[4] In fact, although the trial judge clearly detailed the elements to be proved beyond a reasonable doubt as to the substantive crime of cocaine

---

[4] The trial judge's charge concering the crimes of conspiracy and cocaine possession was as follows:

> Now, Title 21, United States Code, Section 841(a) (1), states, in pertinent part, it shall be unlawfull for any person knowingly, intentionally to possess with intent to distribute a controlled substance.
>
> Cocaine is a controlled substance within the meaning of the law.
>
> In order to establish the offense prohibited by the statute, the Government must prove each of the following elements beyond a reasonable doubt.
>
> One, that the defendant knowingly, willfully possessed cocaine as charged; and two, that he possessed the substance with the intent ot distribute
>
> (footnote continued)

possession which was the purported object of the conspiracy, on the conspiracy count, the judge went directly from the general paragraphs and a detailed summary of what need not be shown to guidelines for determining

---

(footnote continued from previous page)
it.

* * *

> To possess with intent to distribute simply means possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.
>
> Title 21, United States Code, Section 846, provides in pertinent part, any person who conspires to commit any offense defined in the Title is guilty of an offense against the laws of the United States.
>
> So under this law, a conspiracy is a combination or an agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of partnership in criminal purpose in which each member

(footnote continued)

whether a particular defendant was a member of the conspiracy once it has been proved to exist. Entirely absent was the instruction that, to convict, the jury had to determine

---

(footnote continued from previous page)
becomes the agent of every member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey or disregard the law.

The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves what the details of the scheme were, or what its object and purpose was to be, or the precise means by which the object or purpose was to be accomplished.

Similarly, the evidence in the case need not establish that all of the means and methods set forth in the indictment were, in fact, agreed upon to carry out the alleged conspiracy, or that all the means and methods which were agreed upon were actually used or put into operation.
(footnote continued)

beyond a reasonable doubt: one, if a conspiracy, as defined, existed, and two, if Madrid had become a member.

(footnote continued from previous page)

> Neither must it be proved that all of the persons charged as being members of the conspiracy were such.
>
> In your consideration of the conspiracy offense as alleged in the indictment, you should first determine from all of the testimony and evidence in the case whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the particular defendant under consideration willfully became a member of conspiracy.
>
> The statements and acts knowingly made and done during such conspiracy and in furtherance of its objects by any other member of the conspiracy may be considered by the jury as evidence against the defendant under consideration, even though he was not present to hear the statement made to see the act

(footnote continued)

Thus, the jurors in this case convicted petitioner of a crime even though they had not been clearly advised as to what the elements were. This error -- which is of constitutional dimension -- directly

---

(footnote continued from previous page)
done.

> This is true because, as I stated earlier, a conspiracy is a kind of partnership, so that under the law, each member is an agent or partner of every other member, and each member is found to be responsible for the acts and statements of every member made in pursuance of the unlawful scheme.
>
> Of course, mere presence at the scene of a crime, and knowledge that a crime is being committed, are not sufficient to establish that a defendant either directly, or aided and abetted a crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.
>
> It is the position of the accused Carlos Madrid-Palacios that there is no proof before

(footnote continued)

interferes with the meaningful functioning of the jury. The jurors could not possibly have evaluated the facts to determine petitioner's guilt or innocence if they did not know the elements of the crime. Because the error in the charge involves the very definition of the crime itself and thus the meaningful functioning of the jury, and because Madrid's alleged participation was the key factual issue to be resolved, the error cannot possibly be deemed harmless. Cf. Rose v. Clark, 106 S.Ct. 3101 (1986). Accordingly, granting the petition for a writ of certiorari is warranted.

(footnote continued from previous page)
you establishing beyond any reasonable doubt that he knowingly and intentionally joined a drug conspiracy.

CONCLUSION

This case represents a graphic illustration of the harm to befall a criminal defendant where the letter and spirit of the Rules of Appellate Procedure are flouted. Petitioner, sentenced to a 25-year prison term, was convicted after a trial which, at the very least, raised substantial issues affecting the validity of the conviction. But the merits of his claim have yet to be addressed. Instead of an appeal characterized by a government brief which clarifies the issues, oral argument which focuses the dispute and a judicial opinion which explains and applies the relevant law, his case has been given short shrift. In its opposing brief, the government mischaracterized the issues raised and misstated critical portions of the record; and the Court of Appeals, evidently relying on the government's

representations, denied oral argument and affirmed summarily without an opinion. The end result is that petitioner's conviction has been affirmed without any assurance that his legal issues have ever been considered, much less resolved.

The procedures implemented by the Court of Appeals in this case, which contravened the Federal Rules of Appellate Procedure and the court's own local rules, encourage the government to handle difficult legal issues in the very manner it has chosen here -- to obfuscate and misstate them. Because it is important both to the fate of this petitioner and to the integrity of our system of justice,

the writ of certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway
New York, New York 10007
(212) 513-7676

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Attorneys for Petitioner
Carlos Madrid-Palacios

Dated: New York, New York
July 23, 1987

APPENDIX

DO NOT
PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5698
Non-Argument Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-versus-
WOLFGANG ANDREAS EULER-MARKUS,
Defendant-Appellant.

No. 85-5994
Non-Argument Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-versus-
LIZARDO MARQUEZ-PEREZ,
a/k/a CARLOS MADRID-PALACIOS,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(April 23, 1987)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges

PER CURIAM: AFFIRMED. See Circuit Rule 25.

---

*red. R. App. P. 34(a); 11th Cir. R. 23

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 29 1987
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5994

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-versus-

LIZARDO MARQUEZ-PEREZ
a/k/a CARLOS MADRID PALACIOS,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 23, 1987, 11 Cir., 1987, __ F.2d __).

(May 29, 1987)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Peter T. Fay
United States Circuit Judge